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No. 00-1787

In the Supreme Court of the United States

GILBERTO BARRIOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error by sentencing petitioner to 324 months' imprisonment for drug offenses, where the quantity of drugs involved in those offenses was not charged in the indictment or found by the jury beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is unpublished, but the decision is noted at 245 F.3d 793 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2000. A petition for rehearing was denied on March 1, 2001 (Pet. App. 9). The petition for a writ of certiorari was filed on May 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1)

and 846 (Count I); conspiring to import cocaine, in violation of 21 U.S.C. 952(a) and 963, and 18 U.S.C. 2 (Count II); and possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count IV). He was sentenced to concurrent terms of 324 months' imprisonment, to be followed by five years' supervised release, and fined $15,000. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. 1-8.

1. Petitioner was involved in the trucking business. From at least 1989 to 1991, he transported, or arranged for others to transport, large quantities of cocaine on behalf of the Miami-based Falcon/Mugluta cocaine distribution organization. Gov't C.A. Br. 3-30.

During an October 1991 search of a drug stash house, David Borah, a special agent of the Drug Enforcement Administration, obtained a drug ledger for the year 1990, which contained numerous entries referring to "Besi," petitioner's code name. An entry for December 19, 1990, for example, referred to "Besi" and 1,539 kilograms of cocaine. In January 1992, Agent Borah searched a second stash house, which was owned by co-conspirator Sergio Crego, and discovered 3,093 kilograms of cocaine hidden in the attic. Gov't C.A. Br. 5, 7-8; R5:428-429.[1]

2. A federal grand jury returned a superseding indictment charging petitioner and four co-defendants with various cocaine-trafficking offenses. The indictment did not allege the quantities of cocaine involved in those offenses. Gov't C.A. Br. 1; C.A. R.E. Def. Exh. 110 (Indictment).

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[1] That seizure resulted in Count IV of the superseding indictment against petitioner.

At trial, the government introduced evidence establishing, among other things, that petitioner paid various individuals to transport cocaine. In 1989, for example, petitioner paid Alexis de la Nuez approximately $450,000 to arrange for the transportation of two loads of cocaine—totaling 350 kilograms and 500 kilograms, respectively—from Miami to New Jersey; during that same period, petitioner also paid Jorge Diaz $90,000 to transport 300 kilograms of cocaine. Also in 1989, Pedro Rosello, a member of the Falcon/Mugluta organization, helped petitioner remove 50 to 60 boxes of cocaine from petitioner's semi-trailer; thereafter, between 1990 and 1991, petitioner entrusted between 10 and 12 shipments of cocaine to Rosello for delivery to a stash house. In 1991, petitioner paid Luis Pena $150,000 to transport approximately 800 kilograms of cocaine from California to New Jersey. Gov't C.A. Br. 15-16, 19-24, 33.

Petitioner testified on his own behalf. He denied that he had transported cocaine with other truck drivers, such as Pena, who had testified as government witnesses, although he acknowledged knowing these men through the trucking business. Gov't C.A. Br. 32-33.

At the end of trial, neither petitioner nor Jose Perez, the only co-defendant who stood trial, requested that the jury be instructed to find the quantity of cocaine involved in their offenses. The district court gave no such instruction.

The jury found petitioner guilty of the three offenses with which he was charged. Gov't C.A. Br. 2.

3. The Probation Office prepared a Presentence Investigation Report (PSR), which concluded that petitioner's offenses involved "in excess of 150 kilograms of cocaine." PSR para. 31. Petitioner did not challenge that finding at sentencing. See 4/6/99 Sent. Tr. 45

(defense counsel states that he has no factual or legal objections to the PSR). The district court, after concluding that petitioner's Sentencing Guidelines range was 324 to 405 months' imprisonment, sentenced him to concurrent terms of 324 months' imprisonment. *Id.* at 45-46.

4. Petitioner appealed, raising numerous challenges to his convictions, none of which is reasserted here. After petitioner's opening brief had been filed, this Court issued its decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Perez, petitioner's co-defendant, filed a supplemental brief arguing that his sentence was unconstitutional under *Apprendi* because the quantities of cocaine involved in his offenses were not alleged in the indictment or found by the jury. Perez Supp. C.A. Br. 3-8.[2]

The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-8. Although petitioner failed to file a supplemental brief addressing *Apprendi*, the court of appeals nonetheless considered whether his sentence should be reversed pursuant to that decision. *Id.* at 7-8. The court decided that question under the plain-error standard, because the defendants had not raised any *Apprendi*-type claim at trial. *Ibid.* The court "assume[d] arguendo" that petitioner's sentence was imposed in error and that the error was plain. *Id.* at 8. The court concluded, however, that any such error did not affect petitioner's "substantial rights," and thus

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[2] Petitioner attempted to file a supplemental brief addressing the *Apprendi* decision on January 8, 2001, more than two weeks after the court of appeals had issued its decision in this case (and more than six months after this Court issued its decision in *Apprendi*). The court of appeals did not accept petitioner's belated filing.

did not warrant reversal of his sentence under the plain-error standard. *Ibid.* The court, after noting the evidence that petitioner had "apparently delivered 12-15 shipments of cocaine, ranging from 800-1200 kilograms to a co-conspirator," concluded that "there is no evidentiary basis for the jury reasonably to have found that [petitioner] committed the charged crimes without also finding [he was] responsible for at least 5 kilograms of cocaine, as required by 21 U.S.C. § 841(b)(1)(A)(ii)(II)." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-8) that his concurrent 324-month sentences should be vacated in light of this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because the quantity of cocaine involved in his offenses was not alleged in the indictment or found by the jury beyond a reasonable doubt. In *Apprendi*, the Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. The court of appeals' holding that petitioner's sentence, although erroneously imposed under *Apprendi*, is not reversible under the plain-error standard does not warrant further review.[3]

1. Petitioner's cocaine-trafficking offenses were subject to sentencing under the graduated penalties set forth in 21 U.S.C. 841(b) (Supp. V 1999) (conspiracy to

[3] Because the court of appeals has already considered the application of *Apprendi* to petitioner's sentence, this case is unlike those cited by petitioner (Pet. 8) in which the Court granted certiorari, vacated the judgment, and remanded for consideration in light of *Apprendi*.

possess and possession of controlled substances) and 21 U.S.C. 960(b) (Supp. V 1999) (importation of controlled substances).[4] Under those provisions, a defendant is subject to a maximum sentence of 40 years' imprisonment if his offense involves 500 grams or more of cocaine. See 21 U.S.C. 841(b)(1)(B), 960(b)(2) (Supp. V 1999). When a defendant is found guilty of a drug offense involving *any* detectable quantity of cocaine, Section 841(b)(1)(C) and Section 960(b)(3) authorize "a term of imprisonment of not more than 20 years." Consequently, petitioner's concurrent 27-year sentences each depended upon an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved 500 grams or more of cocaine) that was not found by the jury to have been proved beyond a reasonable doubt. The imposition of a sentence above 20 years on each count on the basis of a drug-quantity determination made by the court was thus error under *Apprendi*.

2. Because petitioner did not raise his constitutional claim in the district court, however, that claim was subject to review only under the plain-error standard. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (in order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputa-

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[4] The court of appeals was thus mistaken in suggesting (Pet. App. 7 n.2) that petitioner's drug importation offense is not subject to "a statutory sentencing maximum and thus falls outside the purview of *Apprendi*." For the reasons explained in the text, the court's misunderstanding does not affect the appropriate outcome of the case.

tion of judicial proceedings"). As the court of appeals recognized, petitioner cannot satisfy that standard.

a. Petitioner asserts (Pet. 7) that indictment error, in violation of the Fifth Amendment, is "jurisdictional" and requires per se reversal. This Court has recognized, however, that "most constitutional errors can be harmless." *Neder* v. *United States*, 527 U.S. 1, 8 (1999). The Court has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson*, 520 U.S. at 468). In contrast to those errors that have been held to be "structural," the Court explained, a jury "instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 8-9. The omission of an element from an indictment, like the omission of an element from a jury instruction in *Neder*, does not necessarily render a criminal proceeding "fundamentally unfair" or "unreliable." It is thus not a circumstance in which automatic reversal is required. See *United States* v. *Prentiss*, No. 98-2040, 2001 WL 788648, at *9-*11 (10th Cir. July 12, 2001) (en banc); *United States* v. *Angle*, No. 96-4662, 2001 WL 732124, at *1-*2 (4th Cir. June 29, 2001) (en banc); *United States* v. *Nance*, 236 F.3d 820, 825 (7th Cir. 2000), petition for cert. pending (filed Apr. 24, 2001); *United States* v. *Mojica-Baez*, 229 F.3d 292, 309-311 (1st Cir. 2000), cert. denied, 121 S. Ct. 2215 (2001) (No. 00-1256).[5]

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[5] *Neder* did not cite *Stirone* v. *United States*, 361 U.S. 212 (1960), on which petitioner relies (Pet. 7), as a case involving "structural" error. *Stirone* was decided before the Court's compre-

Moreover, as this Court made clear in *Johnson*, 520 U.S. at 466, all claimed errors in federal criminal trials, regardless of their nature or seriousness, are subject to the plain-error rule set out in Rule 52(b) of the Federal Rules of Criminal Procedure when the defendant does not make a timely objection in the district court. "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). Even a conclusion that a particular type of error is "structural," or "so serious as to defy *harmless*-error analysis," suggests only that such error may always "affec[t] substantial rights," thus satisfying the third of the four requirements for plain-error relief. See *Johnson*, 520 U.S. at 469-469 (emphasis added). Under the fourth requirement, a prejudicial error (including a "structural" one) that would clearly be grounds for relief if it was properly preserved is *not* a proper ground for relief if it was *not* preserved, unless it also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 469-470 (quoting *Olano*, 507 U.S. at 736).

b. The district court's error in sentencing petitioner to 324 months' imprisonment does not require reversal under the plain-error standard. Petitioner cannot show that the error both "affect[ed] substantial rights" and

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hensive adoption of harmless-error analysis in *Chapman* v. *California*, 386 U.S. 18 (1967). *Chapman* and *Neder* cast considerable doubt on whether *Stirone* is consistent with the Court's current view concerning harmless error.

"seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson*, 520 U.S. at 467, for two independent reasons.

First, the *Apprendi* error was of no significance here because the evidence of drug quantity was essentially undisputed. The government's evidence at trial demonstrated that petitioner transported thousands of kilograms of cocaine on behalf of the Falcon/Mugluta organization.[6] Petitioner's defense did not center on the quantities of cocaine involved in his offenses. Instead, petitioner denied all involvement with the cocaine transportation scheme. Accordingly, in finding petitioner guilty of importing cocaine and possessing cocaine with the intent to distribute it, the jury *necessarily* found that petitioner was responsible for in excess of the 500 grams necessary to trigger a sentence of up to 40 years' imprisonment. See Pet. App. 8. Although petitioner now claims (Pet. 7) that "with notice of the drug quantity element, and an appropriate jury instruction as to quantity, the trial result could well have been affected," he fails to explain how the jury might rationally have concluded that he committed the three offenses described in the indictment without participating in an offense involving at least 500 grams of cocaine.[7] In those circumstances, the district court's

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[6] Petitioner asserts (Pet. 3) that the court of appeals "rel[ied] solely on the factual assertions set forth by the Probation Officer in the Presentence Report, and adopted by the sentencing Judge." The trial evidence, however, amply supported the quantity calculations contained in the PSR. See pp. 2-3, *supra*; Gov't C.A. Br. 3-30, 33-34.

[7] With respect to Count IV, the government introduced evidence that the quantity of cocaine seized at Sergio Crego's house was 3,093 kilograms. See p. 2, *supra*. Petitioner did not dispute that evidence at trial or at sentencing.

Apprendi error could not have "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 470 (no relief from plain error where element of offense that was not submitted to jury was "essentially uncontroverted" and the evidence supporting it was "overwhelming"); see also, *e.g.*, *Nance*, 236 F.3d at 826 ("If this jury was going to convict [the defendant] at all—which it plainly did—there is simply no way on this record that it could have failed to find" that the offense involved the enhancing quantity of drugs.); *United States* v. *Keeling*, 235 F.3d 533, 539-540 (10th Cir. 2000), cert. denied, 121 S. Ct. 2575 (2001) (No. 00-10161).

Second, petitioner was convicted on three counts, each of which carries a permissible maximum sentence of 20 years' imprisonment in the absence of a jury finding with respect to drug quantity. See 21 U.S.C. 841(b)(1)(C), 960(b)(3) (Supp. V 1999). If petitioner had been sentenced to the maximum permissible term of imprisonment on each count, the district court would have had the statutory authority to impose consecutive, rather than concurrent, sentences on those counts. See 18 U.S.C. 3584. Indeed, the Sentencing Guidelines would have required the court to run petitioner's terms of imprisonment consecutively, in part, to arrive at a total term of imprisonment within the applicable sentencing range, which in petitioner's case was 324 to 405 months' imprisonment. Sentencing Guidelines § 5G1.2(d); see *United States* v. *Page*, 232 F.3d 536, 544 (6th Cir. 2000), certs. denied, 121 S. Ct. 1389, 121 S. Ct. 1965, and 121 S. Ct. 2202 (2001) (Nos. 00-8491, 00-7751, 00-8611 and 00-9401). Because petitioner could have been sentenced to the same 324-month term of imprisonment through the imposition of partially consecutive sentences on the three counts of conviction, the

Apprendi error in this case could neither affect substantial rights nor seriously affect the fairness, integrity, or public reputation of judicial proceedings. See *Page*, 232 F.3d at 544-545; accord *Angle*, 2001 WL 732124, at *3; *United States* v. *Kentz*, 251 F.3d 835, 842 (9th Cir. 2001); *United States* v. *Parolin*, 239 F.3d 922, 930 (7th Cir.), cert. denied, 121 S. Ct. 2538 (2001) (No. 00-9999); *United States* v. *Sturgis*, 238 F.3d 956, 960-961 (8th Cir. 2001), petition for cert. pending (filed June 19, 2001) (No. 00-10804); but see *United States* v. *Vasquez-Zamora*, 253 F.3d 211, 214 (5th Cir. 2001); *United States* v. *Bradford*, 246 F.3d 1107, 1114-1115 (8th Cir. 2001).[8]

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[8] Petitioner's sentence also includes a five-year term of supervised release. Section 841(b)(1)(C) and Section 960(b)(3) authorize a term of that length by providing that the term be "at least 3 years" for a defendant who, like petitioner, has been found guilty of a drug offense involving *any* detectable quantity of a Schedule II controlled substance. Although the quantity of drugs involved in petitioner's offenses could therefore affect the minimum term of supervised release to which he was subject under various provisions of Section 841(b) and Section 960(b), it could not affect the maximum. The majority of the circuits that have addressed the question agree that the provisions of Section 841(b) and Section 960(b) concerning supervised release, each of which uses the "at least" formulation, establish mandatory minimum terms of supervised release, with a maximum term of supervised release for life. See, *e.g.*, *United States* v. *Page*, 131 F.3d 1173, 1177-1180 (6th Cir. 1997) (citing cases adopting that view from the Second, Eighth, Ninth, and Tenth Circuits), cert. denied, 525 U.S. 828 (1998). Some circuits, however, have held that a term of supervised release under Section 841(b) or Section 960(b) cannot exceed the three-year or five-year maximum term authorized by 18 U.S.C. 3583(b). See *United States* v. *Barnes*, 244 F.3d 172, 178 (1st Cir. 2001); *United States* v. *Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992); see also *United States* v. *Velasco-Heredia*, 249 F.3d 963, 969 (9th Cir. 2001)

c. Petitioner argues (Pet. 9-10) that the court of appeals' application of plain-error review in this case conflicts with *United States* v. *Tran*, 234 F.3d 798 (2d Cir. 2000), and *United States* v. *Jackson*, 240 F.3d 1245, 1247-1249 (10th Cir. 2001), which held that the omission from an indictment of a fact affecting the statutory maximum sentence is automatically reversible. Any conflict with *Tran* would not warrant review at this time, however, because the Second Circuit is reconsidering en banc the reasoning of that decision. *United States* v. *Thomas*, 248 F.3d 76 (2d Cir. 2001) (ordering rehearing en banc in another case presenting the issue). Moreover, although the Tenth Circuit denied the government's petition for rehearing en banc in *Jackson*,

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(finding error in supervised-release term imposed under Section 841(b)(1)(D) that exceeded "statutory maximum" under Section 3583(b)(2)); *United States* v. *Meshack*, 225 F.3d 556, 578 (5th Cir. 2000) (remanding for reduction of supervised release terms under *Apprendi*), cert. denied, 121 S. Ct. 834, modified on reh'g, 244 F.3d 367 (5th Cir. 2001), petition for cert. pending (filed June 5, 2001) (No. 00-10499). The Fourth Circuit took the minority position in *United States* v. *Good*, 25 F.3d 218, 221 (1994), but held in *United States* v. *Pratt*, 239 F.3d 640, 646-648 (2001), that Section 3583 does not impose a cap on the period of supervised release under Section 841(b)(1)(C) and questioned the continuing validity of *Good*. The Ninth Circuit's decision in *Velasco-Heredia* is also inconsistent with its prior decision in *United States* v. *Garcia*, 112 F.3d 395, 398 (1997), and the government has sought rehearing en banc in *Velasco-Heredia* based, among other things, on that intra-circuit conflict. The better view is that, because Section 841(b) (1)(C) and Section 960(b)(3) require imposition of "at least 3 years" of supervised release, they have "otherwise provided" a supervised-release range within the meaning of Section 3583(b), and thus supersede the general maximum term specified in that statute. In any event, petitioner does not specifically challenge his term of supervised release, and this case therefore does not present the question on which the circuits are divided.

the en banc Tenth Circuit has since held that the omission of an element from the indictment is subject to harmless-error review. See *Prentiss*, 2001 WL 788648, at *9-*11. The Tenth Circuit has not addressed the relationship of *Jackson* and *Prentiss*.[9]

Petitioner also argues (Pet. 9-10) that the Fifth and Sixth Circuits, in applying the plain-error standard, have required resentencing whenever a defendant's sentence exceeds the statutory maximum provided for the offense without regard to drug quantity. That contention is not entirely consistent even with the cases petitioner cites to support it, which declined to grant relief for *Apprendi* errors where doing so would not change the defendant's overall sentence. See *United States* v. *Meshack*, 225 F.3d 556, 577-578 (5th Cir. 2000) (because defendant would remain subject to longer sentence on separate count, he could "show no meaningful benefit he would receive from vacating" a sentence imposed in violation of *Apprendi*), cert. denied, 121 S. Ct. 834, modified on reh'g, 244 F.3d 367 (5th Cir. 2001), petition for cert. pending (filed June 5, 2001) (No. 00-10499); *Page*, 232 F.3d at 544-545 (declining to vacate sentence imposed in violation of *Apprendi* where sentences on multiple counts could be run consecutively to achieve same overall sentence).[10] Moreover, the

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[9] In two cases involving the omission of a drug quantity allegation from the indictment, the Fifth Circuit recently held that the omission was a "jurisdictional" error that required resentencing. *United States* v. *Longoria*, No. 00-50405, 2001 WL 815609 (July 19, 2001); *United States* v. *Gonzalez*, No. 00-50406, WL 815606 (July 19, 2001). The government is considering whether to seek rehearing in those cases.

[10] Petitioner also relies on *United States* v. *Nordby*, 225 F.3d 1053, 1060-1061 & n.6 (9th Cir. 2000). The Ninth Circuit in that case merely acknowledged "two possible approaches" to the "sub-

Fifth Circuit, like other circuits, has declined to grant relief under the plain-error standard where, "[c]onsidering the evidence in the record and the evidence available to the government should the case be retried," it was "highly unlikely that a jury on retrial, properly instructed post-*Apprendi*, * * * would find drug quantities * * * different from the amounts attributed to each defendant" at the original sentencing. *United States* v. *Miranda*, 248 F.3d 434, 446 (5th Cir. 2001); accord *United States* v. *Green*, 246 F.3d 433, 437 (5th Cir. 2001); but see *United States* v. *Randle*, No. 97-20360, 2001 WL 811770, at *3 (5th Cir. July 17, 2001). And, while the Sixth Circuit has reversed without examining the strength of the government's evidence in some plain-error cases, see, *e.g.*, *United States* v. *Martinez*, 253 F.3d 251, 255-256 (2001), it has not fully explained the relationship of its various plain-error holdings. At least while those courts are working out the ramifications of plain-error analysis in the *Apprendi* context, review by this Court is not warranted.

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stantial rights" inquiry, one that asks whether the sentence imposed exceeds that authorized by the jury's verdict and one that asks whether the jury would have made the same drug-quantity determination as the judge. The *Nordby* court did not choose between the two approaches because it found that the defendant had borne his burden under both. Moreover, the choice of approach may not have any practical significance because, even if the Ninth Circuit adopts the approach that focuses solely on the length of the sentence for purposes of the "prejudice" prong, the second approach should still come into play when the court, following *Johnson*, 520 U.S. at 467, applies the fourth, discretionary component of the plain-error standard.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
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